NATIONAL LABOR RELATIONS BOARD

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CONFERENCE SPONSORED BY CORNELL UNIVERSITY SCHOOL OF INDUSTRIAL AND LABOR RELATIONS AND THE NATIONAL LABOR RELATIONS BOARD ON NATIONAL LABOR POLICY AT THE 60TH ANNIVERSARY OF THE NLRB AND THE WAGNER ACT

"THE PERILS AND PROGRESS OF THE NATIONAL LABOR RELATIONS BOARD: AN ENDURING LEGACY"

Delivered by:

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Good evening, Dean Lipsky, Professor Gross, past and present Board Members and General Counsels and NLRB employees, ladies and gentlemen. Thank you, Professor Gross, for the kind introduction. And many thanks to the Cornell School of Industrial and Labor Relations for arranging this conference on the 60th anniversary of the NLRB.

I think that Cornell's involvement is particularly appropriate given the proud and distinguished tradition of the ILR School. I am pleased to take this opportunity to pay tribute to my teachers and mentors in the ILR and Law School; the late Kurt Hanslowe, the late Bertram Wilcox and Jean McKelvey. Through my seminar with Professors Wilcox and McKelvey I gained insights into the Steelworkers Trilogy as the story of that important litigation unfolded in the spring of 1960.

We are celebrating this anniversary in a time of crisis and change in the government of our nation, in the labor movement, in labor-management relations and in the National Labor Relations Board. New Deal, New Frontier and Great Society programs are under siege in the 104th Congress. Our agency has been criticized since its inception by employers and unions as well, but the attack this year is the most severe since the thirties. With the encouragement of some employers, certain Congressmen are attempting to use the appropriations process to emasculate the NLRB and thus limit the right of employees to form unions and bargain with their employers.

This right is more vulnerable now than at any time since the Wagner Act was passed. One of the critical underpinnings of a democratic industrial society in which labor and capital co-exist is thus threatened. And we should be clear about what is at stake. An emerging vacuum in collective representation vacated by unions -- and one which has been decried by conservatives like my Stanford colleague, former Secretary of Labor George Shultz, imperils democracy in the workplace.

On this 60th Anniversary of the creation of both the National Labor Relations Act and the National Labor Relations Board, an agency charged with the statute's interpretation and administration, it is useful to look back to the period when the Wagner Act was being debated in the halls of Congress and throughout the land. Examining the history of our agency during this time of tribulation because it reminds me that substantial controversy and criticism from one side or the other, and sometimes both, has been the rule for the NLRB more often than the exception.

Previous anniversaries have inspired the same exercise under different circumstances. In 1960, union membership was near its peak; the liberals were proudly saying that the Wagner Act's purpose had been fulfilled; and in the face of crippling industry-wide strikes in the steel industry, Teamster corruption and domination of interstate trucking and seemingly radical auto settlements, conservatives were worrying about too much union power. By 1985 on our 50th anniversary the pendulum had swung the other way: a Congressional committee concluded that labor law had failed and, worst yet, was impeding the collective bargaining process; union strength was in a steady decline; the conservatives were congratulating the Reagan Board for its reversal of 29 NLRB

precedents[1] in short order and labor was complaining about delays in case processing, a huge backlog at the Board and castigating the Reagan Board for a major tilt toward employers in its decisions.

Today, on our 60th, union membership as a percentage of the workforce is the lowest level since the passage of the Wagner Act; nobody is worrying seriously about excessive union power except perhaps fringe groups like the National Right to Work Committee and the Labor Policy Association; our case backlog at the Board is the lowest in many years although case intake is rising; the House of Representatives voted to slash our budget by 30 percent; and some employer representatives are crying wolf, whining that the agency is biased toward labor, basing their claims not on Board decisions but rather on our increased use of Section 10(j) injunctions, the rising tide of so-called "salting" cases, as well as opinions expressed in my book "Agenda for Reform" published shortly after I was nominated by President Clinton -- a book advocating measures to more effectively implement the NLRA's policies.

Judging by some of the recent rhetoric which seems to be in vogue, some of our critics also may have been leafing through the pages of NLRB history. For example, I quote from an article entitled "NLRB--Industry's New Dictator" as follows:[2]

> Uninvited, but present at every directors' meeting of every company . . . in America, are three shadowy figures who possess extraordinary powers . . . in their supposedly omniscient minds are balanced all profits and all wages, whether in giant industries or village factories. It is the right of these three to issue statutory rules which they alone may abrogate; they can commandeer industrial records, issue fiats, and disregard every established rule of legal evidence in order to secure the convictions of those who oppose them. By virtue of the celestial wisdom . . . which must be theirs, they create their own specific brand of industrial Utopia . . . .

And further with a medical metaphor:

> Its [the NLRB's] officials have now donned their operating robes, sharpened their knives and inserted their legalistic scalpels into private industry and commerce.

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1 This figure was calculated from former Member Peter Walther in "The NLRB Today," 36 Labor Law Journal 803 (1985).

2 The article appeared in the December 1936 issue of H. L. Mencken's "American Mercury." It is illustrative of the temper of the times when our agency was born and perhaps of some of those today who would turn the clock back to The Thirties.

> Should the Board decide, after listening to testimony or after making secret investigations, that the . . . representatives of the stockholders are guilty . . . they then start their ponderous legal millstones which can grind small manufacturers into bankruptcy and big ones into insolvency . . . . The return of a post office receipt is evidence enough that the employer has been duly notified that he must appear in the prisoner's docket.
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> It Can't Happen Here? Well Messrs. Stalin, Hitler and Mussolini must look with understandable envy on the National Labor Relations Act as it is now functioning in the Land of the Free.

Twenty-five years after the Wagner Act was passed, on the first of these anniversary celebrations, the first NLRB Chairman J. Warren Madden, pronounced the Wagner Act a success, declaring that he was:

> [A]ware of no other instance in the history of this country in which a statute of first rate importance has so completely fulfilled the objectives of those who promoted its enactment . . . . It is fair to say that now and for some twenty years past, any workman in an enterprise of any considerable size is a member of a union if he wants to be. As to equality of bargaining power, it may well be that the bargaining power of the unions is, in many industries, greater than that of the employers.

This was of course, the claim and concern of employer groups some of which on our Agency's 25th anniversary were decrying excessive union power and proposing the use of anti-trust laws to break up the United Automobile Workers, the United Steelworkers and other unions into little pieces, confining their legal scope to bargaining with a single employer.

Another 25th anniversary paper entitled "The Duty to Bargain and the Right to Strike" by Board attorney Frederick U. Reel did not even mention the 1938 Mackay decision by the U.S. Supreme Court on the issue of permanent replacement of strikers. Frederick Reel's speech quoted none other than Senator Robert Taft on the sanctity of the right to strike in a democratic society as follows: ". . . free collective bargaining means that we recognize the right to strike . . . ." and Congressional Labor Subcommittee testimony that ". . . the strike threat . . . together with the occasional strike itself, is the force depended upon to facilitate arriving at satisfactory agreements."[3] The issue of permanent

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[3] Frederick U. Reel, "The Duty to Bargain and the Right to Strike," George Washington Law Review, December 1960, page 479.

replacements apparently was not on the radar screens at the 25th anniversary of our agency. Now, slightly less than 40 years later, permanent replacement of strikers -- either the threat or actual use of this tactic -- has become a standard weapon in the arsenal of many employers to the point where the legal protection for the right to strike has become a hollow mockery in this country, and the viability of collective bargaining is being undermined.

Unions have responded to the impairment of their ability to wage a strike with corporate campaigns and disruptive actions on the job. Such alternatives to the strike have brought forth employer allegations that such tactics are both abusive and unnecessarily confrontational. Whatever one thinks about the appropriateness of particular tactics, the ability to bargain constructively for the employees which they represent is essential for the very existence of trade unions. The increasing use of striker replacements in well established or more mature bargaining relationships impairs the bargaining power of unions and diminishes the utility and appeal of collective bargaining to prospective new union members -- and it sends an ominous message to other more fledging and unstable labor-management relationships throughout the country. I applaud President Clinton for his four-square support of the right of employees to withhold their labor and his strong opposition to employers hiring permanent striker replacements.

Union membership is down to a mere 12 percent. But the law is only one of the many factors involved in this phenomenon, a point that I have made in my writings over the years. Amongst the numerous other factors, in my view, are the following: (1) both foreign competition and corporate relocation to other countries; (2) deregulation in union strongholds particularly in the transportation industries like trucking, railroads and airlines; (3) the rising number of illegal alien workers who are frequently afraid to protest employment conditions, let alone become involved in a union organizational effort, because of the fear of retaliation of the more severe variety in for the form of deportation; (4) the expanding contingent workforce, consisting both of temporary and part-time employees, which is sometimes preferred by employers who do not wish to provide fringe benefits like healthcare and other solid employment conditions. Moreover, the unions themselves have frequently been lethargic, and one of the beneficial by-products of the current contest for AFL-CIO leadership is the fact that both Messrs. Sweeney and Donahue agree that the AFL-CIO must increase its expenditures on organizational efforts tenfold! That is one point which is <u>not</u> in dispute between the contenders! The labor movement itself must redouble its efforts.

This is not to minimize the role of the law. The fact of the matter is that Congress and the Board itself need to constantly be looking at ways in which we can improve the statute, particularly through more expansive and effective remedies, so that the basic purposes which support the practice and procedure of collective bargaining as well as freedom of association amongst workers can be implemented. We need to promote more effective employee participation and communication with management. In a series of rulings the Supreme Court has established real limitations in some of these areas for the

Board -- but there is nothing to stop Congress from overruling the Court where it is appropriate to do so.

This does not mean that unfair labor practices or problems with elections will go away. As former Chairman Ed Miller pointed out at our agency's 50th anniversary, unfair labor practices have not disappeared because they are unlawful any more than murder has disappeared although it has been unlawful ever since Moses came down from the mountain with the Ten Commandments. We must do more than simply proclaim the illegality of conduct!

Our primary effort at the Board for the past 19 months has not been to reverse precedents from previous Boards, but rather to reduce the Board's backlog of cases, eliminating delays in procedures, reducing the need for litigation and encouraging informal dispute resolution procedures. Innovations have included an improved postal ballot procedure for representation elections in situations where employee voters are scattered or where the part-time or temporary status of workers makes their presence at an onsite plant election uncertain or improbable -- or where the location of an election is distant from the nearest NLRB field office; a trial project involving Administrative Law Judge procedures including the use of settlement judges and bench decisions in appropriate cases; and the proposed adoption of a single unit rule for representation elections which is designed to enable the parties to avoid needless relitigation of old issues.

Experience to date with settlement judges has been encouraging. Every case that is resolved short of a formal ALJ hearing represents a significant savings in time and money to all concerned -- to the taxpayers and the parties. Our increased resort to temporary injunctions against both employer and union unfair labor practices gives me particular satisfaction. And no case stands out more than our injunction in baseball, recently upheld by the Second Circuit's emphatic opinion, which produced the resumption of the baseball season and, equally important, an American League Eastern Division Championship for the Boston Red Sox!

The agency also has been engaged in a variety of streamlining activities designed to reduce duplication of effort, lower supervisory ratios, reduce administrative and headquarters staff and put more people in the field where they are needed. We have been working hard on improving and speeding up our somewhat labyrinthine decision-making processes. We are conscious of the truth of the old saw that justice delayed is justice denied, and we have been working hard to speed ourselves up.

Most important of all, no innovation has been more important to us than the adoption, in December 1994, of the "speed team" case handling procedure. The speed team procedure eliminates preparation of duplicative and unnecessary documents in cases which are essentially factual where credibility determinations have already been made either by an Administrative Law Judge or Hearing Officer in a dispute arising out of a representation proceeding. The key to effective use of the speed teams procedure is direct and active involvement of the participating Board member.

The speed team procedure has been used in 110 cases since it was adopted last year. The median number of days for issuance of all unfair labor practice cases during this time period was 104 days compared to 59 days for speed team cases. The comparable figures for representation cases are 85 days and 38 days, a more than 50 percent reduction in the time required to issue a decision. This contrasts vividly with the median for processing unfair labor practices by the Board of 273 days in 1985 and its peak of 395 days in 1989.

Our current backlog is 366 cases compared to 1196 in 1985 on the 50th anniversary and 476 in 1960 on the 25th.[4] The backlog of cases before the Board -- a problem which has concerned my predecessors ever since the terms of Chairman Frank McCulloch in the '60s -- is the lowest since 1974 except for '91 and '92.

We hope that the new Administrative Law Judge procedures and single unit rule will reduce the number of cases coming to the Board for decision. Despite the relatively non-controversial nature of the changes we have made, criticisms from some quarters continue unabated -- just as they did when President Franklin D. Roosevelt's fledgling agency created the modern framework for industrial relations in this country.

In truth, the role of interpretation and adjudication is frequently more complex. But it is the National Labor Relations Act that we interpret -- and I submit our interpretations as well as my proposals for the reform of the statute are consistent with overall policy purposes, i.e., the preamble's focus upon the promotion of the practice and procedure of collective bargaining -- and they are and balanced in their respect for the concerns of all parties which come before us.

A weakness in our system is well demonstrated by the 29 doctrinal reversals in the 1980s to which I alluded earlier. The system of industrial relations in this country has always been polarized and it has become more so in recent years.

It is inevitable that views about politics, economics, and society affect one's judgment about labor policy and perhaps, in limited circumstances, interpretations of the statute itself. As a general proposition involving judges and the law this point was made eloquently by Justice Benjamin Cardozo more than seven decades ago.[5]

My view is that Congress could make changes which would limit the relationship of politics to the Board in the bad sense of the word. Frequently, in the past the Board's decision-making process has been disrupted by prolonged vacancies on the five-member

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[4] Total cases filed:

Year	Total Cases	Number of Employees	NLRB
1960	21,527	1774	
1985	41,175	2580	
1995	42,700 (Estimate)	2054	

[5] Benjamin N. Cardozo, The Nature of the Judicial Process (Yale University Press) 1921.

Board and by excessive turnover due to the high degree of politicization in the appointment and the confirmation process. As I have stated previously, I am of the view that a constructive change in the Act would be to move away from five-year terms, with the current possibility of reappointment, to single seven or ten year terms -- as in the Board of Governors of the Federal Reserve -- with no possibility of reappointment. In this way, we would get the very best people to serve for the very best reasons.

It is important for the statute to be interpreted by dispassionate and principled individuals whose only thought, like that of Cincinnatus so many years earlier, is to return to their homes and their farms after their terms have expired and to continue their work in some other capacity.

Also, consideration should be given to allowing incumbent Board members to continue to serve until the confirmation by the Senate of their successor. This would eliminate problems experienced as a result of prolonged vacancies when the President and the Senate cannot agree on a new appointee.

These then are some of the steps that should be taken toward achieving our objective of both an expert agency committed to the impartial administration of the law. I fear that our initiatives and ventures are imperiled by last summer's budget cuts proposed by the House of Representatives -- although I am heartened and encouraged by the position taken by both the United States Senate and President Clinton's veto threat.

This is an important occasion, both celebratory and reflective. In no other modern industrialized country has one expert administrative agency and legal framework endured for so long. Even in Great Britain with its centuries of democratic institutions which it has given to the world and our country, no comparable commitment to the rule of law in the workplace has ever been made.

Cornell University is to be commended for working with us and creating this conference which I hope will be of use practitioners and scholars in this country and throughout the world for years to come. My hope is that in another 60 years time our grandchildren will be able to build upon the contributions made by our predecessors and those that we make here today -- and that the legacy will endure for them as it has for us!

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